Supreme Court, U.S.
FILED
NOV 26 2003
OFFICE OF THE CLERK

(5)

No. 03-218

IN THE
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF FOCUS ON THE FAMILY AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE*, SUPPORTING PETITIONER

WILLIAM WAGNER
Counsel of Record

PHILIP J. PRYGOSKI
COOLEY LAW SCHOOL
300 South Capitol
Lansing, MI 48933
(517) 371-5140

STEVE REED
35 N. Lake Ave.
Pasadena, CA 91101
(626)449-4521

PAT TRUEMAN
801 G. Street NW
Washington D.C. 2001
(202)393-2100

34 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

INTEREST OF *AMICI CURIAE* 1

CONSENT TO FILE BRIEF 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

THE COURT OF APPEALS COMMITTED CLEAR ERROR IN APPLYING STRICT SCRUTINY TO THE CHILD ONLINE PROTECTION ACT 5

A. The "Harmful to Minors" Material Proscribed in COPA is Commercial Child Obscenity. As such, it Deserves, and Therefore Receives, NO Protection under the First Amendment to the United States Constitution 5

B. COPA'S Provisions are Rationally Related to Legitimate Government Interests 25

C. Judged in Relation to the COPA's Plainly Legitimate Sweep, COPA is not Substantially Overbroad 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003)..... 4, 5, 7
ACLU v. Reno, 31 F.Supp. 2d 473 (E.D. Pa. 1999)... 27
Ashcroft v. A.C.L.U., 535 U.S. 564 (2002)..... 7,26,27
Boston Beer Co. v. Massachusetts, 97 U.S. 25(1878)..10
Broadrick v. Oklahoma, 413 U.S. 601 (1973)..... 26
Cohen v. California, 403 U.S. 15 (1971) 17
Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) 13
FCC v Pacifica Foundation, 438 U.S. 726 (1978)..14,17
Ginsberg v. State of New York, 390 U.S. 629 (1968) 7,9,14-16,18,19,24,25,27
Miller v. California, 413 U.S. 15 (1972)..... 7, 12-14,18,19,23-25,27
New York v. Ferber, 458 U.S. 747 (1982)..... 14,22,23,26,28,29
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)..... 7,8,11,19,25,28,29
Poe v. Ullman, 367 U.S. 497 (1961) 9
Pope v Illinois, 481 U.S. 497 (1987)..... 19,24, 27
Reno v ACLU, 521 U.S. 844 (1997).....15, 26
Roth v. United States, 354 U.S. 476 (1957).....7,11,23
Schenck v. U.S., 249 U.S.47 (1919)..... 11
Smith v. United States, 431 U.S. 291 (1977)..18,19,24,27

Constitution and statutes:

U.S. Const: Amend. I 7

Child Online Protection Act of 1998 (COPA), 47 U.S.C. § 231 ..... 3, 5-7,18

Miscellaneous:

MODEL PENAL CODE §207.10 (2) (Tentative Draft No. 6, 1957) 12

Committee Report on COPA, H.R. Rep. No. 105-775 (1998).....19-21, 27

Hearings on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. 9 (1998) [Hearings] 9, 21

S. Rep. No. 106-141 (1999) 21

Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L.R. 391, (1963)..... 10

INTEREST OF AMICI CURIAE

This *amicus curiae* brief is filed on behalf of Focus on the Family and the Family Research Council.[1]

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological, and spiritual health of children and their families in the United States and throughout the world.

Focus on the Family's Founder and Chairman, Dr. James Dobson, a distinguished child psychologist, served as a Commissioner on the Attorney General's Commission on Pornography in 1985-86 and is the author of scores of books, pamphlets, and papers on child development, education, marriage, and society.

Focus on the Family and Dr. Dobson have produced two major videos, "A Winnable War" and "Fatal Addiction: Ted Bundy's Final Interview", which directly discuss the harms of pornography to children, men, women, and families in America, as well as Dr. Dobson's interview with Ted Bundy and his book *Pornography: Addictive, Progressive and Deadly*. Tom Minnery of Focus was compiler and editor of the book *Pornography: A Human Tragedy*, chronicling analyses and commentary on the testimony and findings of the Attorney General's Commission on Pornography. In addition, Focus continues to produce resource materials on these issues, such as "An Overview of Online Pornography:

---

[1] In accordance with Rule 37(6), *amici* certify that this brief was authored entirely by Counsel of Record for *amici* and that no part of the brief was authored by any attorney for a party. The Alliance Defense Fund provided a monetary contribution to the preparation or submission of this brief; no other person or entity other than *amici curiae* or their counsel provided a monetary contribution to the preparation or submission of this brief.

The Problems, a Legal Review, and Activist Organizations", "The Power of the Picture", "When Sex Becomes An Addiction", "An Affair of the Mind", and "Toxic Porn." Worldwide, countless concerned citizens, public officials, professionals, and parents have seen and read these videos and books. Millions of people hear Focus on the Family's daily radio broadcasts dealing with family concerns and interests on over 2,000 outlets in North America. Its monthly magazine has a circulation of nearly two million. Focus on the Family regularly communicates and counsels with victims and families who have children devastated by pornography, molestation, and abuse. See: www.family.org.

Family Research Council is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC is a voice for the pro-family movement in Washington, D.C., and provides policy analysis, legislative assistance, and research for pro-family organizations. It also seeks to educate legislators on issues that affect American families.

In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC works to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. Its research, publications, and films on the impact of pornography have been distributed to over 400,000 scholars, students, organizations, and citizens. FRC's legal and public policy experts are continually sought out by members of Congress and State legislators for assistance and advice on the unique relationship between parents and their children.

FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts, including those involving the regulation and harmful effects

of pornography, obscenity, and child pornography. FRC publishes and disseminates resource materials, legal memoranda, and public policy studies on pro-family issues. These publications include discussions on the problems and legal controversies surrounding pornography. See: www.frc.org.

Focus on the Family and Family Research Council work to preserve and protect the family and have particular knowledge about the social and legal impact of pornography that will be helpful to the Court in this case.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record, consented to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

To protect our nation's children, and to preserve a decent society, Congress may, consistent with the First Amendment, restrict commercialized child obscenity on the Internet that is "harmful to minors." Congress may do so, regardless of whether such material is deemed obscene to adults. In this regard, *amici* contend that the "harmful to minors" material restricted by the Child Online Protection Act, 47 U.S.C. § 231 (1998), is a category of material ***wholly outside*** the protection of the First Amendment.

Thus, the Court of Appeals committed clear error in applying strict scrutiny to COPA. The court below erroneously assumed that COPA's provisions constituted

content-based regulation of expression protected by the First Amendment. *ACLU v. Ashcroft,* 322 F.3d 240, 247, 251 (3rd Cir. 2003). Acting on this incorrect assumption, the Court of Appeals treated COPA's provisions as presumptively invalid and erroneously subjected the statute to strict scrutiny. *Id.*

Before deciding the constitutionality of COPA, *amici* request this Court to determine whether the commercialized "child obscenity", restricted as "harmful to minors" by COPA, deserves protection under the First Amendment. Good and serious reasons exist for this Court to hold that such material is unprotected by the First Amendment. These reasons include:

> 1) The Government has an interest in maintaining a decent society through restrictions on commercialized obscenity;
> 2) The Government has an interest in protecting our children from exploitation and exposure to commercialized obscene materials;
> 3) The commercialized child obscenity, restricted as "harmful to minors" in COPA, is in fact, dangerously harmful to our children and their future;
> 4) Permitting a commercial onslaught of child obscenity to our children lacks any value worthy of protection; and
> 5) Recognizing and classifying commercial child obscenity, as a category of material unprotected by the First Amendment is consistent with this Court's prior decisions.

COPA is rationally related to the government's interest in protecting our nation's children from

commercialized child obscenity, and in preserving a national right to a decent society.

Amici, therefore, urge this Court to reverse the Court of Appeals and uphold the constitutionality of the COPA as passed by Congress.

ARGUMENT

THE COURT OF APPEALS COMMITTED CLEAR ERROR IN APPLYING STRICT SCRUTINY TO THE CHILD ONLINE PROTECTION ACT

The Court of Appeals erroneously assumed that COPA's provisions constituted content-based regulation of expression protected by the First Amendment. *ACLU v. Ashcroft,* 322 F.3d 240, 247, 251 (3rd Cir. 2003) Acting on this incorrect assumption, the Court of Appeals treated COPA's provisions as presumptively invalid and erroneously subjected the statute to strict scrutiny. *Id.* Because COPA's provisions do not restrict *protected* speech under the First Amendment, this Court should hold COPA's provisions constitutional if its provisions are rationally related to a legitimate government interest. (See discussion *infra* in subsection A and subsection B of this brief).

A. THE "HARMFUL TO MINORS" MATERIAL PROSCRIBED IN COPA IS COMMERCIAL CHILD OBSCENITY. AS SUCH, IT DESERVES, AND THEREFORE RECEIVES, NO PROTECTION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

As passed by Congress, COPA provides that:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign

> commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both. 47 U.S.C. § 231(a).

Within the statute, Congress precisely defined "material that is harmful to minors" --

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. 47 U.S.C. § 231(e)(6).

Before deciding whether COPA is constitutional, this Court should first inquire whether the material restricted by the statute is unprotected by the First Amendment.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. Historically, this Court has never included within the protection of the First Amendment, material of the kind proscribed by COPA. *See, e.g., Roth v. United States,* 354 U.S. 476, 482-485 (1957); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54 (1973); *Miller v. California*, 413 U.S. 15, 23 (1972); *Ginsberg v. State of New York*, 390 U.S. 629, 635 (1968); *see also, Ashcroft v. A.C.L.U.*, 535 U.S. 564, 574 (2002).

Amici request this Court to recognize that the "harmful to minors" material restricted by COPA is a category of material ***wholly outside*** the protection of the First Amendment. No party contests this point with regard to COPA's restriction on traditional adult obscenity, as stated in the first part of the definition providing that material is "harmful to minors" if it is "obscene." *See ACLU v. Ashcroft,* 322 F.3d at 246 n.6.

As in cases involving adult obscenity and child pornography, *amici* believe that Congress is also entitled to restrict commercialized child obscenity on the Internet that is "harmful to minors." *Amici* request this Court to recognize that the commercial child obscenity, restricted by COPA as "harmful to minors," *also* falls outside the protection of the First Amendment. *Amici* provide the following reasons in support:

Reason I – *The Government has an interest in maintaining a decent society through restrictions on commercialized obscenity.*

In *Paris Adult Theater I*, (hereinafter *Paris*) this Court affirmed the existence of a legitimate government

interest in maintaining a decent society by restricting commercialized obscenity:

> The States have a long-recognized legitimate interest in permitting regulation of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. In an unbroken series of cases extending over a long stretch of this Court's history it has been accepted as a postulate that the primary requirements of decency may be enforced against obscene publications. (internal quotes and citations omitted) *Paris*, 413 U.S. at 57.

In particular, Chief Justice Burger, for the Court in *Paris*, held that a legitimate state interest exists in restricting commercialized obscenity -- even where effective safeguards "against exposure to juveniles and to passersby" exist. *Id.* This Court expressly recognized that the American public has a right to maintain a decent society:

> These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself... It concerns the tone of the society, the mode, ... the style and quality of life, now and in the future *** there is a right of the Nation and of the States to maintain a decent society. (quotation marks and citation omitted) *Id.* at 58-59.

It is certainly clear that Congress, in working toward passage of COPA, believed in a right of our nation to maintain societal decency. For example, at a hearing on legislative proposals, one member of Congress cited to a recent national poll finding that "the number one concern on

the minds of voters is the moral decline of our society." *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. 9 (1998)* [hereinafter, Hearings], (statement of the Rep. Oxley). Congressman Oxley's statement cautioned that:

> If we as a nation hope to address the coarsening of our culture and the loss of values among our young people, we have to begin by addressing the most serious threat, and do so by protecting kids from the degrading content readily available on the Internet. *Id.*

In *Ginsberg*, this Court upheld the constitutionality of the state criminal child obscenity statute upon which Congress patterned COPA. *Ginsberg* itself noted that the state court of last resort, in upholding the legislature's power to employ variable concepts of obscenity, relied on "its power to protect the health, safety, welfare and morals of its community..." *Ginsberg*, 390 U.S. at 636. Thus, if the physical and psychological states of our children are of obvious importance, the moral condition of our nation's youth is at least as compelling. As Justice Harlan stated in his opinion in *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961):

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of

> subjects with which every society in civilized times has found it necessary to deal . . .

The broader issue in the instant case is whether the Constitution permits a state to regulate on the basis of morality. The more specific (and perhaps easier) question is whether a state may constitutionally regulate commercial child obscenity on the basis of morality.

Consideration of the Court's obscenity jurisprudence, on its own terms, reveals that the prevailing test for obscenity is rooted in the state's interest in preserving morality and decency. A careful analysis reveals that, "[o]bscenity laws. . .are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual 'decency' and 'morality'." Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L.R. 391, (1963).

One must analyze obscenity law within the larger context of morals legislation in general. A state (or the federal government) certainly has the power to prohibit certain conduct solely because it contravenes the collective moral code of the community. The power of the government to regulate for the advancement and preservation of morals and decency is a time-honored principle of law:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however different it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to. . .the preservation of good order and the public morals." *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1878).

This power of the government to regulate for purposes of morality and decency is reflected in laws prohibiting prostitution, incest, adultery, and polygamy, to name a few. These offenses include "victimless" crimes, in which the only discernible evil is that of immorality. An analysis of the test for restricting adult obscenity reveals that such is an appropriate power of government.

When the Supreme Court first had occasion to deal with the issue of obscenity in *Roth*, 354 U.S. 476, it *did not* adopt the clear and present danger test, which had its origin in *Schenck v. United States*, 249 U.S. 47 (1919). The clear and present danger test is a device used by the courts to connect speech with conduct the government may regulate (i.e., non-speech evil). If, for instance, speech causes a breach of the peace, the government may certainly punish the person who directly brought about the substantive evil that the government has a right to prevent. If the rationale for proscribing obscenity were simply that it caused rapes or sexual assaults, there would have been no need to create an entire new category of unprotected speech. But, if the rationale for obscenity laws was to maintain standards of morality and decency and to preserve the moral tone of the community (*see, e.g., Paris*, 413 U.S. at 57-59), another method of analysis was needed. The Court adopted this new approach by creating the *Roth* test: "Whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest." 354 U.S. at 489

In elaborating on what obscenity meant, from a constitutional perspective, the Court stated that "a thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e. a shameful or morbid interest in nudity, sex, or excretion, . . ." *Roth* 354 U.S. at 487-88 n. 20

quoting MODEL PENAL CODE §207.10 (2) (Tentative Draft No. 6, 1957).

The clarifying quotation from the Model Penal Code focuses on an unhealthy lustful, shameful, or morbid interest in nudity, sex, or excretion. This clearly and unequivocally posits morality and decency as the justification for prohibiting obscenity, even as to adults. These bases for creating a new category of unprotected speech become even more compelling when applied to children.

In its revised obscenity test from *Miller*, this Court retained the "prurient interest" test, and also asked whether the work depicts or describes, *in a patently offensive way*, sexual conduct specifically defined by the applicable state law. 413 U.S. at 27. The thrust of the obscenity test is clearly not that any evil conduct must accompany the speech. The use of "prurient interest" as the touchstone for obscenity, as well as the focus on "patently offensive" in the *Miller* test, are clear indicators that obscene speech comprises a category of unprotected activity precisely because it offends contemporary standards of morality and decency.

Another aspect of *Miller* points in the direction of the concept of obscenity having a close relationship to decency. In describing what a state could clearly prohibit as obscene under *Miller*, the Court lists, "[p]atently offensive representations or descriptions of . . . excretory functions..." 413 U.S. at 25. The evil a state addresses with such a statute is an offense to a person's sensibilities caused by an explicit description of excretory functions. This kind of statute is not directed to speech causing any sort of anti-social sexual behavior; rather its focus is on maintaining an acceptable level of decency and preventing injury to an adult's moral sensibilities. That such is an acceptable reason for a state to

regulate speech is even more remarkable because the usual rule is that a government cannot regulate speech simply because it offends someone. *See, e.g., Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (striking down a local ordinance which made it a crime to display any material that causes racial or religious hatred). Obscenity regulation is permissible because the speech effects are a special kind of offense to the morality and decency of the community. Morality and decency, then, are placed on a higher level than psychic or emotional sensibilities.

Prior to enunciating the test for obscenity in *Miller*, this Court discussed the rationale for certain categories of speech being unprotected by the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Miller*, 413 U.S. at 20-21 (internal quotation marks and citations omitted).

The last word in this excerpt is especially instructive. Morality is the prevailing value when balanced against speech that is not an essential part of any exposition of ideas. This is precisely the balance struck by Congress when it promulgated COPA. Commercial child obscenity is balanced against society's interest in protecting and preserving the moral values of our nation's children.

Commercial child obscenity, as carefully defined by COPA in conformance with the *Miller* standards, is clearly not a category of speech that is an essential part of any exposition of ideas. When placed up against society's interest in protecting our children and preserving societal decency, no question exists about which value is more important.

Reason II *-- The Government has an interest in protecting our children from exploitation and exposure to commercialized obscene materials.*

In *New York v. Ferber*, 458 U.S. 747, 765-66 (1982), this Court concluded that non-obscene child pornography fell into a category of material not entitled to protection under the First Amendment. In reaching its conclusion, this Court reaffirmed that:

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. *Ferber*, 458 U.S. at 756-57 (1982) (Internal quotation marks and citations omitted).

Thus, it is clear that "[t]he well-being of its children is . . . a subject within the State's constitutional power to regulate..." *Ginsberg*, 390 U.S. at 639; *see also*, *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (government's interest in the well-being of its youth justified

special treatment of non-obscene indecent broadcasting received by adults and children); and *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (addressing Congress's earlier attempt to restrict sexually explicit material on the Internet, this Court acknowledged that the Government has an interest in protecting children from harmful materials -- and noted the Act's legitimate purposes.)

Similar to COPA, the statute upheld in *Ginsberg* made it a crime "knowingly to sell *** to a minor under 17 ... any picture *** which depicts nudity *** and which is harmful to minors," ... and "any *** magazine *** which contains *** (such pictures) *** and which, taken as a whole, is harmful to minors." *Ginsberg*, 390 U.S. at 633.

The obscene materials commercially sold to a child in *Ginsberg* were

> 'harmful to minors' in that they had, within the meaning of [the statute] that quality of *** representation *** of nudity *** (which) *** (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors. *Ginsberg*, 390 U.S. at 632-33.

Even though the material at issue in *Ginsberg* was "not obscene for adults," this Court recognized the statute's restrictions as "obscenity of material sold to minors under 17." *Ginsberg*, 390 U.S. at 634-35. In upholding the statute, this Court acknowledged that it, like COPA, was "a variable from the formulation for determining obscenity [used by the Court for adults]." *Ginsberg*, 390 U.S. at 635.

This Court discussed the efficacy of adopting a concept of "variable obscenity" as a tool to determine whether material obscene to children falls into a category of speech unprotected by the First Amendment:

> *Variable obscenity* . . . furnished a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance." *Ginsberg*, 390 U.S. at 634, n.4 (emphasis added; internal quotation marks and citations omitted).

COPA does precisely what this Court alluded to in *Ginsberg*. Its legislative history and its carefully crafted language deal only with material intended for an audience of sexually mature adults, and that is by statutory definition unprotected as to minors. COPA also focuses on the primary (child) audience and the peripheral (adult) audience, and draws a constitutionally appropriate distinction between the two classes.

Perhaps the most important factor in analyzing the appropriateness of the concept of variable obscenity is that of the "varying circumstances" surrounding the dissemination of speech. The most salient circumstance is the method of communication -- the Web. This medium is intrinsically different from books, movies, magazines, records, TV, radio, or any other medium of communication with which this Court has dealt in the past. The paradigm has changed. An almost universally available medium of communication for

the dissemination of commercial child obscenity changes the constitutional calculus in profound ways.

The Court has always analyzed speech cases transactionally. That is, it looks at who the speaker is, who the audience is, and what the method of communication is. As each of these variables changes, the analysis may change. For instance, in *FCC v. Pacifica Foundation*, the Court upheld a restriction on the broadcast of a sexually and excretorily explicit monologue by George Carlin. 438 U.S. 726 (1978). The monologue was broadcast on the radio, during daytime hours, and heard by a child. *Id.* at 729-730. These factors led the Court to uphold a time restriction on the broadcast, observing that there were other ways for consumers to receive the information. *Id.* at 749-50.

However, in *Cohen v. California*, 403 U.S. 15, 91 (1971), the Court reversed a conviction for breach of the peace occasioned by a person having a vulgar message on a jacket inside a courthouse. The main factor that distinguished *Pacifica* from *Cohen* was the medium of communication. In *Pacifica*, the transmission over the airwaves was found to be very intrusive into the right of a parent to control what his child heard, because it was an auricular assault, and the burden was on the disseminator to change the time of his speech. 438 U.S. at 748-50. In *Cohen*, on the other hand, a visual assault in a courthouse was not pervasive enough to punish the gesture, and Justice Harlan, for the Court, suggested that the solution to the problem was simply for the viewer to look away. *Cohen*, 403 U.S. at 21-22.

Transmission by the Internet is the most intrusive, pervasive medium of communication ever created. In the otherwise privacy and safety of home, the Internet's omnipresent accessibility to our children makes it an

especially dangerous method of transmitting commercial child obscenity.

Like COPA in the instant case, the statute in *Ginsberg* simply adjusted "the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests of such minors." *Ginsberg*, 390 U.S. at 638 (internal quote and citations omitted). Here, as in *Ginsberg*, the government was justified in restricting "the availability of sexual material to minors since it was rational for the legislature to find that the minors' exposure to such material might be harmful." *Ginsberg*, 390 U.S. at 639. In this regard, *Ginsberg* recognized that:

> [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. *Id.*

When Congress enacted COPA it, like the legislature that promulgated the statute in *Ginsberg*, "expressly recognized the parental role in assessing sex-related material harmful to minors" according to an adult community standard with regard to what is suitable to minors. *Ginsberg*, 390 U.S. at 639; *see also* 47 U.S.C. § 231 (e)(6)(1998); *Miller*, 413 U.S. at 24-25 (1973), *Smith v. United States*, 431

U.S. 291, 300-02, 309 (1977), and *Pope v Illinois*, 481 U.S. 497, 500-01 (1987). Moreover, nothing in COPA restricts "the discretion of the parent to purchase material for their children who are under the age of 17." *See*, H.R Rep. No. 105-775, at 15 (1998).

Ginsberg further recognized an independent interest of the government in protecting the "welfare of children" and ensuring they are "safeguarded from abuses which might prevent their growth into free and independent well-developed ... citizens." *Ginsberg*, 390 U.S. at 640-41 (internal quotation marks and citation omitted). In *Miller*, this Court stated, "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller*, 413 U.S. at 18-19. *Miller* then upheld the constitutionality of a criminal obscenity statute and articulated the test for obscenity adopted by Congress in COPA. 413 U.S. at 24-25 (1973), as modified by *Smith*, 431 U.S. at 300-02, 309 (1977), and *Pope*, 481 U.S. at 500-01 (1987). Finally, in *Paris* this Court, as in previous decisions, again "pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults," *Paris*, 413 U.S. at 57 citing *inter alia*, *Miller*, 413 U.S. at 18-20.

Reason III – *The Commercialized Child Obscenity, Restricted as "Harmful to Minors" in COPA is, in Fact, Dangerously Harmful to our Children and Their Future.*

Evidence in the record links the material proscribed in COPA to criminal and other dangerously unhealthy conduct. For example, in its report accompanying COPA, Congress documented how the material restricted by COPA

harms children. H.R. Rep. No. 105-775, at 11 (1998). Specifically, the report indicated that:

> A child's sexual development occurs gradually throughout childhood. Exposure to pornography shapes children's sexual perspectives by providing them with information on sexual activity intended for adults. The type of information provided by pornography, however, does not provide children with a normal sexual perspective. Unlike learning provided in an educational or home setting, exposure to pornography is counterproductive to the goal of healthy and appropriate sexual development in children. . . . *Id.* (citing Brooks, Assistant Chief of Psychology Services, Department of Veterans Affairs, The Centerfold Syndrome (1996)).

The report also summarized testimony before Congress highlighting the dangers of exposing children to material restricted by the statute:

> Pornography produces "permission-giving beliefs" for sexual pathology and sexual violence and that pornography produces distortions that change an individual's belief system. As a result, children exposed to pornography can become victims or victimizers, encouraged by the strong sexual images contained in pornography found on the World Wide Web. H.R. Rep. No. 105-775, at 11 (1998), citing testimony of Dr. Mary Anne Layden.

Indeed, in a congressional hearing, Congress received compelling evidence of horrendous problems that occur in adults, from their exposure as children to material proscribed by COPA. The problems include unhealthy, harmful sexual addiction, suicide, rape, and other crimes of violence. *See*

Hearings, 105th Cong. 55-57, 84 (1998)(statement of Dr. Mary Anne Layden). For example, Dr. Layden testified that for the past 13 years she had specialized in the treatment of sexual violence victims and perpetrators. In all those 13 years she had not treated one case of sexual violence that did not include material proscribed by COPA as a substantial factor. See Hearings, 105th Cong. 56 (1998) (statement of Dr. Mary Anne Layden).

Moreover, according to the Federal Bureau of Investigation, the Internet and other on-line services have become "one of the most prevalent techniques by which pedophiles and other sexual predators" identify and recruit "children for sexually explicit relationships." Hearings, 105th Cong. 26 (1998) (Statement of Stephen R. Wiley, Chief, Violent Crimes and Major Offenders Sections, Federal Bureau of Investigation).

The congressional report accompanying COPA also noted "the body of research indicating that pornography has significant impact on attitudes and values, and that such impact is clearly harmful to minors." H.R. Rep. No. 105-775, at 11 (1998) citing testimony from the organization Enough is Enough.

When Congress passed the Child Internet Protection Act (CIPA), another statute designed to protect the well-being of children on the Internet, it documented additional evidence of the danger facing our children. S. Rep. No. 106-141, at 1 (1999). The Senate Report documented the increased access to the Internet by schools and libraries receiving federal assistance, and then reported that:

> Though the Internet represents tremendous potential in bringing previously unimaginable education in information opportunities to our nation's children,

there are very real risks associated with the use of the Internet. Pornography, including obscene material, child pornography, and indecent material is available on the Internet. This material may be accessed directly and intentionally, or may turn up as the unintended product of a general Internet search . . . the aggressive tactics of commercial pornographers on the Internet expose children to random, and unintended exposure to sexually explicit material. *Id.* at 2.

The Senate Report next documented how the exposure to pornography harms children and their development. *Id.* at 3. The Report continued by documenting

> the increasing incidents of pedophiles utilizing the Internet to lure and seduce children into illegal and abusive sexual activity. In many cases, such activity is the product of individuals, taking advantage of the anonymity provided by the Internet to stalk children . . . [A]n increasingly disturbing trend is that of highly organized, and technologically sophisticated groups of pedophiles who utilize advanced technology to . . . sexually exploit and abuse children. *Id.* at 3-4.

It is clear in the instant matter that the danger to our children is real. When the constitutionality of a statute like COPA is at issue, this Court traditionally has accepted legislative findings in connection with the potential danger and harm to children. *Ferber*, 458 U.S. at 757-58

Reason IV *– Permitting a commercial onslaught of patently offensive sexual material to children (designed to appeal to a child's unhealthy lustful, shameful, morbid interest in sex – and lacking serious literary, artistic, political, or scientific value), lacks constitutional value.*

Like adult obscenity and child pornography statutes, *amici* acknowledge that commercial child obscenity restrictions "run the risk of suppressing protected expression." *See Ferber*, 458 U.S. at 756. *Amici* submit, however, that material of the kind described in COPA lacks constitutional value, due to its extreme detachment from the fundamental principles protected by the First Amendment.

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. Again, commercial child obscenity, as carefully defined by COPA in conformance with the *Miller* standards, is clearly not a category of speech that is an essential part of any exposition of ideas. The value of permitting a commercial onslaught of patently offensive sexual material to children (designed to appeal to a child's unhealthy, shameful, morbid interest in sex – and lacking serious literary, artistic, political, or scientific value) is, therefore, "exceedingly modest, if not *de minimis*;" *See Ferber*, 458 U.S. at 763, *Miller*, 413 U.S. at 34-35.

Free speech ranks among the most cherished of our fundamental freedoms. *Amici* suggest that it is exceedingly doubtful, however, that the framers of our Constitution intended to protect pedophiles and commercial peddlers of pornography who provide access to patently offensive hard-core sexually explicit material to our children. "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans

the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Miller*, 413 U.S. at 34.

"Harmful" sexually explicit material for adults, ought not be constitutionally protected when someone, for commercial purposes, makes it available to children – whether at the newsstand, the World Wide Web, or anywhere else. This is especially true when the commercial peddler of porn intrudes via the Internet into the sanctity of one's home to sell their wares. Too much is at stake, whether in terms of our nation's right to societal decency, or the well-being of our children.

***Reason V** -- Recognizing and classifying commercial child obscenity, as a category of material unprotected by the First Amendment, is consistent with this Court's prior decisions.*

In the instant case, Congress deliberately drafted the "harmful to minors" definition in COPA consistent with this Court's jurisprudence in the area of child obscenity.

Congress patterned COPA after the child obscenity requirement upheld in *Ginsberg*, drawing on the three-part test for obscenity for minors modified in *Miller*, 413 U.S. at 24-25, *Smith*, 431 U.S. at 300-02, 309 (holding that an "average person, applying contemporary community standards" also serves as the standard in the second prong, determining the patent offensiveness of the material) and *Pope v Illinois*, 481 U.S. at 500-01 (holding that in prong three, "a reasonable person" standard is applied to the serious value determination). Thus, when Congress defined "material that is harmful to minors" in COPA, it created a *Millerized-Ginsberg* definition for what is obscene for minors. It is important to note that this Court has directed its

holdings, "not at thoughts or speech, but at depiction and description of specifically defined sexual conduct" that may be properly regulated. *See*, *Paris*, 413 U.S. at 69.

A careful reading of COPA's provisions, in the light of these cases, brightly illuminates congressional understanding of this Court's constitutional jurisprudence when it promulgated COPA. Thus, classifying commercial child obscenity, as a category of material unprotected by the First Amendment, is consistent with this Court's prior decisions.

B. COPA'S PROVISIONS ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS

The commercial child obscenity, proscribed in COPA as "harmful to minors" is, for the five reasons discussed in the previous section, a category of speech ***wholly outside*** the protection of the First Amendment. To protect our nation's children, and to preserve a decent society, Congress may, consistent with the First Amendment, therefore, restrict commercialized child obscenity on the World Wide Web. Moreover, this is true even if, in the extremely unlikely event, such material is not also obscene to adults. Restricting commercial peddlers of child obscenity from selling their material to our children on the Web is rationally related to the government's national interest in maintaining a decent society. It is also rationally related to the government's interest in protecting the well-being of our children. COPA is, therefore, constitutional. *See, e.g., Ginsberg*, 390 U.S. at 641-43; *Miller*, 413 U.S. at 18-19; *Paris*, 413 U.S. at 57.

C. JUDGED IN RELATION TO THE STATUTE'S PLAINLY LEGITIMATE SWEEP, THE CHILD ONLINE PROTECTION ACT IS NOT SUBSTANTIALLY OVERBROAD

"[T]he wide-reaching effects of a court striking down a statute on its face, at the request of one whose own conduct may be punished despite the First Amendment," are undisputed. *Ferber*, 458 U.S. at 769 quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court, therefore, recognizes "that the overbreadth doctrine is 'strong medicine'" and employs it 'with hesitation, and then only as a last resort.'" *Id.* Indeed, "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber*, 458 U.S. at 767. Given that this traditional rule is grounded in Article III of the United States Constitution (limiting the jurisdiction of federal courts to *actual* cases and controversies), any exception – like the overbreadth doctrine – "must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, 458 U.S. at 768-69. Thus, to succeed in a facial challenge to a statute like COPA "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615; *Ashcroft v. ACLU*, 535 U.S. at 584

This Court struck down Congress's first attempt to protect the nation's children from exposure to indecent sexually explicit material on the Internet. *Reno v ACLU*, 521 U.S. 844 (1997) (holding the Communications Decency Act of 1996 (CDA) unconstitutional.) As recognized in *Ashcroft*, Congress, in drafting COPA, responded to the overbreadth

objections to the CDA relied upon by the Court in the *Reno* decision:

> First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communication made "for commercial purposes." And third, while the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors" *Ashcroft v. ACLU*, 535 U.S. at 569-70; *see also* H.R. Rep. No. 105-775, at 16 (1998).

Thus, it is clear that Congress intended to limit the scope of COPA to address an expressly narrow part of the child obscenity problem. As discussed previously, Congress patterned the definition of "harmful to minors" in COPA after the child obscenity requirement upheld in *Ginsberg*, drawing on the three-part test for obscenity for minors modified in *Miller*, 413 U.S. at 24-25, *Smith*, 431 U.S. at 300-02, 309, and *Pope*, 481 U.S. at 500-01. The plain language used in COPA, as construed in this Court's obscenity jurisprudence, cannot, by definition, censor or inhibit *protected* speech of any kind. This is especially true in light of COPA's affirmative defenses, which further narrow the scope of COPA's coverage. Thus, Congress made clear it did not intend the provisions of COPA to apply to serious treatment of sexual issues. In any case, the materials Respondents allege are at risk are not at risk. Indeed, the District Court opinion in this case reveals that the trial court found none of the material at issue even potentially "harmful to minors." *ACLU v. Reno*, 31 F.Supp. 2d 473, 480, 484-86 (E.D. Pa. 1999). COPA's provisions virtually eliminate any possibility of selective prosecutorial

enforcement, especially when read in the bright light of this Court's obscenity jurisprudence. Judged in relation to the COPA's plainly legitimate sweep, any overbreadth here is illusory, and, in context, certainly not substantial.

"When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *Ferber,* 458 U.S. at 769 n. 24.

CONCLUSION

Amici ask that this Court not take away the right of the American adult community to preserve societal decency and to protect its children. Who we are morally, as individuals and as a nation, is a fabric made up of much more than express opinions. Here it is important to note again that, in the decisions relied upon by *amici*, this Court has directed its holdings, "not at thoughts or speech, but at depiction and description of specifically defined sexual conduct" that may be properly regulated. See, *Paris*, 413 U.S. at 69.

Your *amici* suggest that permitting a commercial onslaught of patently offensive sexual material to children (designed to appeal to a child's unhealthy, shameful, morbid interest in sex) will physically desensitize our children to that higher sentiment of individual and collective decency. Collectively, if this Court sanctions such a commercial offensive against our nation's children in the name of free speech, expect the remnants of what is left of our national moral fabric to unravel.

Undeniably, we stand at a constitutional construction site. Those who came before us built a constitutional democratic republic upon fundamental foundations of decency. It is now our watch. It is well for us to recall, therefore, the ancient truth that "righteousness exalts a nation." *Proverbs* 14:34 (NIV).

If, in the name of free expression, we guarantee the right of individuals to engage in obscene harmful conduct to our children, we merely create an illusion of a nation willing to protect fundamental freedoms. Such a course inevitably erodes the fundamental foundations of our country. In the end, the structural institutions of free government may stand for a time; the very essence for which they stand, however, ceases to exist.

Here the "evil to be restricted" "overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber*, 458 U.S. at 763-64. The class of material defined in COPA "bears so heavily and pervasively on the welfare of children" and on a national right to decency in society, that its commercialization on the Internet overwhelmingly tips the balance of any competing interests. *Ferber*, 458 U.S. at 763-64; *Paris*, 413 U.S. at 57-61. Moreover, the method of transmission into the privacy and safety of our home, is the most intrusive, pervasive medium of communication ever created. Indeed, the Internet's ubiquitous accessibility to our children makes it a particularly dangerous method of transmitting commercial child obscenity. *Amici* contend, therefore, that it is permissible to consider these materials wholly undeserving of the protections afforded by the First Amendment.

COPA's provisions are rationally related to the governmental interests of protecting our nation's children, and preserving a decent society. Congress may, therefore,

consistent with the First Amendment, restrict commercialized child obscenity on the Internet that is "harmful to minors." *Amici* here provide this Court with good, serious reasons to reach such a holding. For these reasons, *amici* urge this Court to reverse the Court of Appeals and uphold the constitutionality of COPA as passed by Congress.[2]

Respectfully submitted,

WILLIAM WAGNER
Counsel of Record

PHILIP J. PRYGOSKI
COOLEY LAW SCHOOL
300 South Capitol
Lansing, MI 48933
(517) 371-5140

STEVE REED
35 N. Lake Ave.
Pasadena, CA 91101
(626)449-4521

PAT TRUEMAN
801 G. Street NW
Washington D.C. 2001
(202)393-2100

November 26, 2003

[2] *Amici*, in the alternative, suggest that COPA is narrowly tailored to compelling governmental interests, and would therefore, on that alternative basis, also urge reversal.